Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

No. 95-865

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

OF COUNSEL:

PROFESSOR JOHN CIBINIC, JR.
George Washington University
Law School
Washington, D.C. 20052

KATHLEEN A. BUCK
Kirkland & Ellis
Washington, D.C. 20005

MAC S. DUNAWAY
GARY E. CROSS
Dunaway & Cross
Washington, D.C. 20036

CLARENCE T. KIPPS, JR.
Counsel of Record
ALAN I. HOROWITZ
KEVIN C. DWYER
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE UNMISTAKABILITY RULE IS NOT APPLICABLE TO THIS CASE 5

A. The Unmistakability Principle Comes Into Play When A Party Contends That The Government Has By Implication Surrendered A Sovereign Power, But It Does Not Displace Ordinary Interpretive Principles For Every Government Contract That Imposes Some Constraint On Government Action 7

B. The Unmistakability Rule is Inapplicable In A Suit For Breach Of Contract Damages 17

II. THE SOVEREIGN ACT DEFENSE DOES NOT EXCUSE THE GOVERNMENT FROM BREACH OF CONTRACT LIABILITY 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE), 477 U.S. 41 (1986) 11, 12, 13, 19, 20

Cooke v. United States, 91 U.S. 389 (1875) 22

D & L Constr. Co. v. United States, 402 F.2d 990 (Ct. Cl. 1968) 25

Deming v. United States, 1 Ct. Cl. 190 (1865) 21

Everett Plywood Corp. v. United States, 651 F.2d 723 (Ct. Cl. 1981) 23

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 19

Freedman v. United States, 320 F.2d 359 (Ct. Cl. 1963) 25

Gerhard F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948) 25

Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) 25

Page

Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908) 9

Horowitz v. United States, 267 U.S. 458 (1925) 4, 21, 22, 25

Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (1993) 5, 14-15, 26

Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436 (1862) 9, 19

Jones v. United States, 1 Ct. Cl. 383 (1865) 21, 22

Lynch v. United States, 292 U.S. 571 ..... 6-7, 16

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 11, 13, 14

Miller v. United States, 140 F. Supp. 789 (Ct. Cl. 1956) 23

Montana v. United States, 450 U.S. 544 (1981) 14

Murray v. Charleston, 96 U.S. 432 (1878) 4, 16, 17

O'Neill v. United States, 231 Ct. Cl. 823 (1982) 21, 22

Perry v. United States, 294 U.S. 330 (1935) 22

TABLE OF AUTHORITIES -- Continued

Page

Piqua Branch v. Knoop, 57 U.S. (16 How.) 369 (1853) 10, 16

Preseault v. ICC, 494 U.S. 1 (1990) 19

Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830) 8, 16

Sinking Fund Cases, 99 U.S. 700 (1879) 22

St. Louis v. United Rys. Co., 210 U.S. 266 (1908) 8

Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978) 22, 23

Sunswick v. United States, 75 F. Supp. 221 (Ct. Cl. 1948) 25

The Delaware R.R. Tax, 85 U.S. (18 Wall.) 206 (1873) 9, 10

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 16

United States v. Bostwick, 95 U.S. 53 (1876) 5, 24, 25

United States v. Cherokee Nation, 480 U.S. 700 (1987) 13, 14, 18

TABLE OF AUTHORITIES -- Continued

Page

Vicksburg, S. & P.R. Co. v. Dennis, 116 U.S. 665 (1886) 8-9

W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) 16

Statutes:

12 U.S.C. §§ 1464(t)(3)(A) and (9)(B) 23

12 U.S.C. (1986 ed.) §§ 1730(t)(2), 1729(f)(2)(A) 10

28 U.S.C. § 1491(a)(1) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-865

UNITED STATES OF AMERICA,
Petitioner,

v.

WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The Aerospace Industries Association of America, Inc. (AIA) represents the nation's manufacturers of aerospace equipment, including aircraft, missiles, spacecraft, and related components. The Electronic Industries Association (EIA) is a national organization of more than 1200 companies

involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association (NSIA) is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a voluntary, nonprofit trade association founded in 1920 to promote a sound private shipbuilding and ship-repair industry in the United States; to promote an adequate mobilization potential of privately owned shipbuilding, ship repair, and allied industry for availability during national emergencies; and to afford a means of cooperation between government and industry on matters of national concern.

The members of these associations have thousands of contracts, worth billions of dollars, to provide goods and services to the United States, and many of them derive a substantial portion of their revenues from such contracts. The integrity of those government contracts will be undermined if the government's expansive arguments concerning the "unmistakability" and "sovereign act" principles are accepted by this Court. Accordingly, these organizations have a strong interest in this case, and we believe the Court would benefit from their views.

Both petitioner and respondents have consented to the filing of this brief, and letters reflecting those consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

I. A. 1. This Court has never advanced the "unmistakability" principle as a broadly applicable rule for interpretation of government contracts. Rather, it operates in a limited setting as a kind of maxim that helps determine the intent of the contracting parties. The Court will not lightly find in a government contract an implied waiver of the government's essential sovereign powers, like the power to tax. Because the government would not ordinarily be expected to contract away such critical authority, this Court has consistently stated that it will not find such a contractual surrender unless it is expressed in unmistakable terms.

This case is far removed from the Court's precedents on this point, and the government's invocation of the unmistakability rule here stretches it well beyond its recognized bounds and the limits of its rationale. A prophylactic interpretive rule that reflects the Court's reluctance to find a waiver of the sovereign power to tax should not be extended to the ordinary government contract, where there is no reason to doubt that, as part of the bargain, the government intended to make an enforceable promise regarding its future actions. No decision of this Court suggests that the reach of unmistakability is so broad, and its use should be restricted to the setting in which it has previously been applied -- namely, where parties claim a waiver of a sovereign power that is essential to an independent government.

2. Moreover, this case differs from the line of unmistakability cases in another important respect. In the precedents on which the government relies, the plaintiffs argued for an implied limitation on the taxation power based

on contracts that did not address taxation at all. Here, however, the government action revokes a promise that was at the heart of the bargain of the parties. A conclusion that the government retained the power to breach its obligation through subsequent government action would render the explicit contractual promise a nullity; the unmistakability rule does not call for such an untoward result. *See, e.g., Murray v. Charleston*, 96 U.S. 432, 445 (1878).

B. The unmistakability rule does not apply where a party seeks only damages, but does not seek to prevent the government from exercising its powers. The latter situation raises jurisprudential issues that warrant protection against a contract interpretation that could hamstring the ability to govern. Merely holding the government financially responsible for breach of contract, however, does not raise those issues. The distinction between restraining the government and holding it liable for damages is embodied in the Fifth Amendment, and it is equally appropriate in connection with the unmistakability rule. No court has ever invoked the rule in order to reject a claim for breach of contract damages, and this Court should not depart from that history here.

II. A. The "sovereign act defense" does not preclude damages liability in this case. That defense is not designed to confer any special immunity on the government that would not be available to a similarly situated private contractor. The defense applies only when a "public and general" governmental act prevents performance. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Here, the legislative changes addressed to supervisory goodwill were targeted at the contract rights created in the thrift mergers, and therefore the sovereign act doctrine does not apply.

B. In accordance with the principle of *United States v. Bostwick*, 94 U.S. 53, 68-69 (1877), the Federal Circuit has correctly ruled that a direct government promise in the contract may demonstrate assumption of financial responsibility for sovereign acts that interfere with contractual obligations. In particular, when the government promises to abide by a specific regulation or policy, the sovereign act doctrine does not excuse the government from paying damages if a change in that policy causes a breach. *See, e.g., Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958-59 & n.8 (Fed. Cir. 1993). That principle is applicable here where the government promised to perform in accordance with specified policies, and it is fatal to invocation of the sovereign act defense.

ARGUMENT

I. THE UNMISTAKABILITY RULE IS NOT APPLICABLE TO THIS CASE

The "unmistakability" language in this Court's prior decisions does not establish a broadly applicable rule for interpreting government contracts. That language was developed in cases where private parties contended that the government had impliedly contracted away its right to exercise the sovereign power to tax, even though the contracts were silent on the subject. The unmistakability language reflects the Court's view that a waiver of the tax power will not lightly be implied, but must be evidenced by contract language manifesting the government's intent to cede that power. To the extent the "unmistakability" principle can be called a rule of contract interpretation, it applies only where a party asserts that the government has contracted

away, surrendered, or waived a sovereign power akin to taxation. That is not the case here.

The government argues, however, that the "unmistakability" rule is broader and forecloses the Federal Circuit's conclusion that respondents are entitled to damages from the government for breach of contract. Specifically, it argues that, as a matter of law, a government's "exercise [of] sovereign regulatory authority" (Br. 11) cannot breach a contract unless the contract provides in unmistakable terms that the rights it confers are not to be affected by subsequent government action. This argument expands the effect of the Court's unmistakability language beyond recognition.

The government impermissibly seeks to alter the role of the unmistakability principle and to extend its area of applicability. The government maintains that the rule is not merely a limited aid to contract interpretation, but rather a dispositive doctrine (in favor of the government) that trumps any other evidence of the intent of the contracting parties. And the government would extend the rule beyond its limited setting to apply to every ordinary government contract.

This proposed expansion of the unmistakability rule would unfairly and unwisely ruin a private contractor's ability to rely upon the government's commitments. As the Court of Federal Claims stated below, if the government's promises in routine contracts are subject to being voided later by unilateral government action, it "would make all dealings with the government a very elaborate and expensive form of gambling." Pet. App. 167a. The resulting uncertainty would be harmful not only to private parties, but also to the government's contracting ability. As Justice Brandeis wrote for this Court in *Lynch v. United States*, 292 U.S. 571, 580

(1934): "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Contractors would become more wary of contracting with the government and, at a minimum, would justifiably require higher prices to compensate them for bearing the additional risk that subsequent government action would negate its commitments. Accordingly, this Court should reject the government's proposed expansion of the unmistakability rule both because it is legally erroneous and because it would have a deleterious effect on government contracting to the detriment of the public interest.

A. The Unmistakability Principle Comes Into Play When A Party Contends That The Government Has By Implication Surrendered A Sovereign Power, But It Does Not Displace Ordinary Interpretive Principles For Every Government Contract That Imposes Some Constraint On Government Action

The source of the "unmistakability" rule is a series of 19th century cases that put forth the unremarkable proposition that the government should not be *presumed* to have contracted away its sovereign power to tax private entities. The cases involved contracts addressed to business arrangements between the government and private parties, and the Court ruled that it would not lightly find an implied waiver of the government's sovereign power to tax. The rationale for the private parties' argument was that their contracts neither listed taxation as one of the conditions of the arrangement nor expressly reserved that power for the future. The Court, however, held that it would find such a contractual waiver by the government only if it was actually stated in unmistakable terms.

Although the Court has referred to this principle from time to time, its contours have not substantially changed since its inception. The government enters into innumerable contracts in which it makes promises that commit it to certain courses of action and that, correspondingly, entail implicit promises to refrain from action that would breach those commitments. In contrast to cases involving a claimed surrender of the power to tax, there is no reason in run-of-the-mill contract situations for a court to doubt that, as part of the bargain, the government implicitly agreed to constrain its future actions in order to allow performance of its direct promise. Accordingly, the rationale for the unmistakability rule is absent, and it should not be extended to every government contract.

In this case, the nature of the government promise in connection with respondents' goodwill accounting is far removed from a critical sovereign power like the taxing power; it is not appropriate to erect an "unmistakability" hurdle to concluding that the government did make a binding promise to respondents on this point. Rather, the scope of the contractual obligation should be resolved by applying regular principles of contract interpretation.

1. The seminal case is *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830), where the Court held that the state charter issued to a bank did not carry with it a promise not to tax the bank in the future. The Court commented that the taxing power benefits the entire community, and therefore "its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." *Id.* at 561. *See also St. Louis v. United Rys. Co.*, 210 U.S. 266, 275-76, 280 (1908); *Vicksburg, S. & P.R. Co.*

v. Dennis, 116 U.S. 665, 668 (1886); *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1862).

The government purports to derive from these cases a "long-established" and much broader rule of general contract interpretation -- namely, that "contracts that limit the government's future exercises of regulatory authority . . . will be recognized . . . only when the limitation on future regulatory authority is expressed in unmistakable terms." Br. 16; *see also* Br. 18. But these cases are hardly so expansive as to cover every routine act of government regulation. Indeed, each of the older cases cited by the government for this broad proposition in which the Court invoked the unmistakability rule to justify a restrictive contract interpretation (Br. 17-18) involved a claimed contract right that infringed on the government's *taxation* power.[1]

Thus, the government's broad view of unmistakability is premised entirely on dicta, not the holdings of these cases. Even the dicta, however, have been stretched far beyond their bounds by the government's characterizations here. The government relies (Br. 18) primarily on one sentence in *The Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 225-26 (1873), which describes the unmistakability rule as applying "with special force" when the claimed contract right "calls for any abridgement of the powers of the government." As the next sentence makes clear, however, the phrase "powers of the government" was not meant to encompass the entire spectrum

---

1 *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265 (1908), does not involve the taxation power, but it also does not involve interpretation of a contract. Rather, the issue addressed by the Court was whether a municipal agency had the authority to enter into a contract guaranteeing certain telephone rates. *Id.* at 273-74.

of regulatory or other actions that fall within the government's broad authority. The Court continued (*id.* at 226): "The power of taxation is an attribute of sovereignty, and is essential to every independent government." Not every government power is "essential" nor does every constraint on governmental action "affect[] the sovereignty of the State." *Piqua Branch v. Knoop*, 57 U.S. (16 How.) 369, 390 (1853).

The government actions in this case fall outside the narrow category of sovereign powers that warrant a prophylactic "unmistakability" inquiry in construing a contract. The government's authority to establish capital requirements for financial institutions, and certainly the details of how to measure a particular institution's capital, are hardly powers that are "essential to every independent government." *See The Delaware R.R. Tax*, 85 U.S. (18 Wall.) at 226. There is accordingly no particular reason to be skeptical that government regulators might obligate themselves contractually to preserve certain treatment of goodwill for a particular financial institution in exchange for consideration provided by that institution for the benefit of the government. Indeed, as the Federal Circuit noted, the FSLIC was authorized by statute both to set minimum capital limits on a case-by-case basis and to extend assistance to acquirers of insolvent FSLIC-insured thrifts. Pet. App. 39a, citing 12 U.S.C. (1986 ed.) §§ 1730(t)(2), 1729(f)(2)(A). In these circumstances, the Court's prior decisions that are the source of the unmistakability principle are inapposite, and the contract should be interpreted by reference to the usual inquiry into the intent of the contracting parties.

The more recent cases cited by the government (Br. 16-17) are no more supportive of its position than are the 19th

century taxation cases. Although these decisions mention the unmistakability rule in passing, they rely primarily on other evidence of the intent of the parties. They do not apply the rule in a way that departs from the narrow contours of the earlier cases, and they certainly do not evince any intent to expand the rule.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982), is essentially indistinguishable from the early cases. A sovereign Indian Tribe entered into a lease contract allowing a company to produce oil and gas on tribal lands in exchange for royalty payments. When the Tribe enacted a severance tax, the company argued that implicit in the lease arrangement was a contractual promise by the Tribe not to impose severance taxes. This Court rejected that argument, observing that the Tribe's power to tax did not hinge on exercising that power when it first granted the leases (*id.* at 145) and that the Tribe did not need to insert an express reservation of the taxing power in the lease contract (*id.* at 147). In the course of its discussion, the Court cited its earlier taxation cases for the proposition that a government's sovereign power ordinarily should survive a contract "unless surrendered in unmistakable terms" (*id.* at 148), but that citation suggests no expansion of the unmistakability rule.

The government relies most heavily on language in *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), which does differ in some respects from the typical taxation case. *POSSE* involved an agreement between California and the federal government to bring the state's employees within the federal Social Security program -- an agreement made "in conformity with" section 418 of the Social Security Act, which at that

time allowed a state to terminate its participation in the program. *See id.* at 48. The Court rejected California's argument that this agreement rendered unconstitutional a later amendment to the Social Security Act that eliminated a state's power to withdraw from the program.

Contrary to the government's suggestion, it is clear that *POSSE* did not expand the unmistakability rule; the Court did not even purport to "rel[y] on the principle" (Gov't Br. 16) of unmistakability for its holding. The language quoted by the government comes from an introductory section of the Court's opinion in which it listed several principles that formed "the backdrop" for its consideration of California's claim, most of which were closely related to the specific Social Security context before the Court. 477 U.S. at 52. Among these principles were: (1) that the Act contains "a clause expressly reserving to [Congress] '[t]he right to alter, amend, or repeal any provision' of the Act"; (2) that the Act itself created no contractual rights; (3) that this concern against foreclosing Congress from exercising its authority "take[s] on added force" in the context of "a comprehensive social welfare program affecting millions of individuals"; and (4) that "[i]n view of the purpose and structure of the Act, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority." *Id.* at 51-53.[2]

---

[2] The government's partial quotation of this last statement (Br. 16) is misleading in that it suggests that the Court was making a general comment about all agreements and all government powers. The full text makes clear that the Court was addressing only section 418 agreements and was relying on the specific features of the Social Security Act, including its express reservation of the power to alter its provisions.

Nestled within this list was a quote from *Merrion* stating that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Id.* at 52 (quoting 455 U.S. at 148). The Court never returned to this "unmistakability" principle in the body of its opinion and did not rely upon it for its holding. Rather, the Court emphasized three points in ruling against California: (1) the existence of a statutory provision explicitly reserving the right to amend the Act, which "expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself" (*id.* at 54); (2) that the agreement by its terms expressly incorporated section 418, which was subject to amendment (*id.*); and (3) that the clause in the agreement relied upon by the State "was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration" (*id.* at 55).

Thus, the Court in *POSSE* never discussed whether or how the unmistakability rule would apply in the specific context presented there. Certainly, in quoting from or paraphrasing *Merrion*, it did not expand the rule beyond its previously recognized bounds. And the Court's decision in no way suggests that the unmistakability rule should apply here, to a situation that lacks any of the three features on which it primarily relied in *POSSE*.

The third modern case cited by the government, *United States v. Cherokee Nation*, 480 U.S. 700 (1987), similarly adds nothing to the traditional understanding of the

unmistakability rule. The Court there emphatically rejected the contention that, when the United States conveyed to an Indian Tribe title to a riverbed, it implicitly contracted away the navigational servitude that permits it to make improvements in aid of navigation. The Court stated that it "would be wholly extraordinary" to imply such a provision into the treaty since "the navigational servitude applies to *all* holders of riparian and riverbed interests." *Id.* at 706. Indeed, the Court continued, even when the States "gain 'the absolute right to all their navigable waters,'" that right is "unquestionably subject to 'the paramount power'" of the federal government's navigational servitude. *Id.* at 707 (quoting *Montana v. United States*, 450 U.S. 544, 551 (1981)). Only after giving this explanation of why the Tribe's contractual contention was so implausible did the Court add a single sentence quoting the *Merrion* formulation of the unmistakability rule. The Court did not elaborate on that rule in *Cherokee Nation*, and its citation of the rule in connection with the navigational servitude, an inherently sovereign power akin to taxation, lends no support to the government's effort to expand the rule to apply to every manner of government action.[3]

---

[3] The government attempts to blunt somewhat the breadth of its contentions by describing the unmistakability doctrine in terms of federal "regulatory" authority. That is not much of a limitation, however, when it sweeps wide enough to encompass details about whether the government will honor specific contract terms related to the calculation of capital for a particular institution. Moreover, the government's approach stretches well beyond any common sense understanding of the term "regulatory." In its petition for certiorari (at 24), the government criticized not only the decision below but also the Federal Circuit's decision in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (1993). The government, through NASA, had entered the business of launching commercial satellites and had contracted to launch numerous satellites on behalf of private companies. After the Challenger disaster, however, the President determined that "NASA would no longer be in the business of launching commercial spacecraft" (*id.* at 956), and the government advised several companies that it would not honor its contracts to launch the satellites. In the *Hughes* case, the government defended against one company's breach of contract suit by invoking (unsuccessfully) the unmistakability defense, even though the government's decision to remove itself from the commercial launch business cannot reasonably be characterized as "regulatory."

2. This case differs from the line of unmistakability cases in another important respect wholly unrelated to the difference in the nature of the governmental power involved. The unmistakability cases typically involve claims of *implied* government promises that are tangential, at best, to the focus of the contractual terms. Claimants in those cases argued, for example, that contracts issuing a bank charter, a streetcar license, or an oil lease implicitly carried with them a promise not to tax the new enterprise, even though the contracts said nothing specific about taxation.

By contrast, the contractual claim here goes to the heart of the bargain made by the parties. It is not disputed that the parties engaged in "extensive negotiations" (Pet. App. 22a) over the terms of the accounting treatment of goodwill and amortization that would be permitted and that it "was the intent of the parties" (*id.*) that the government would incur contractual obligations as a result of those negotiations, which were reduced to writing in documents that were incorporated into the contract. Indeed, the Court of Federal Claims found that these promises regarding regulatory accounting were the "linchpin" of the contracts without which no purchaser would

have entered into the contracts. Pet. App. 154a. The government argues, however, that the unmistakability rule means that these promises are worthless in the face of subsequent Congressional or regulatory action.

That argument is contradicted by prior precedent of this Court. For example, in *Piqua Branch v. Knoop*, the Court discussed *Providence Bank* in detail and distinguished it on the ground that general principles of unmistakability cannot defeat a specific contractual undertaking. 57 U.S. (16 How.) at 387-88. In that case, a bank charter specified a particular tax rate and, even though the charter said nothing about the impact of future legislative changes, the Court held that subsequent legislation imposing a higher tax rate was an unconstitutional impairment of contract. *Id.* at 392; *cf. id.* at 409, 414 (Campbell, J., dissenting) (arguing that charter lacks "expression of such a deliberate purpose" to forgo "exercise of a sovereign power" and therefore the case should be controlled by *Providence Bank*). *See also United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

This Court's discussion in *Murray v. Charleston*, 96 U.S. 432 (1878), is especially instructive. In that case, a city sought to impose a tax on the holders of its own debt instruments. The practical effect of the two percent tax was to reduce the six percent interest payments owed to the holders of the debt instruments. The underlying contracts said nothing about constraining the city's sovereign right to tax, and therefore the unmistakability rule presumably would have insulated the city's tax from attack if the rule meant what the government argues here.

This Court, however, refused to allow the city's sovereign power to trump its contractual obligations in that fashion. The Court observed that "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." 96 U.S. at 445. More generally, the Court stated that "[i]t is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Id.* These observations are equally pertinent here. It is absurd to read the contracts as containing a promise to allow a particular treatment of goodwill, while at the same time implicitly reserving for the government the right to revoke that promise by subsequent unilateral action. The unmistakability rule was designed to aid in implementing the intent of the parties, and it does not call for such a counterintuitive result.

B. The Unmistakability Rule Is Inapplicable In A Suit For Breach Of Contract Damages

The Federal Circuit correctly held (Pet. App. 37a-39a) that there is no basis for applying a special unmistakability rule of contract interpretation where a party does not seek to prevent the government from exercising its power. No case, including the numerous cases cited by the government here, has ever invoked the rule in order to reject a claim for breach of contract damages. Indeed, the ancestor of the Court of Federal Claims was created more than a century ago for the specific purpose of adjudicating monetary claims against the government. During that period, the Court of Federal Claims and its predecessors have been the near-exclusive forum for breach of contract suits against the government, issuing countless decisions holding the government liable in damages for breach of contract. That no case antedating the ones

before this Court even discussed the possibility that the damage awards could be barred by the unmistakability rule (which the government itself notes has been "recognized" since 1830 (Br. 17)) strongly confirms the Federal Circuit's conclusion that the government's invocation of the rule in a suit for damages expands it well beyond its historical bounds.[4]

Moreover, the government's rejection of the Federal Circuit's distinction cannot be squared with the text of the Tucker Act, 28 U.S.C. § 1491(a)(1), which makes the government liable in damages for claims founded "upon any express or *implied* contract with the United States" (emphasis added). Notwithstanding the unmistakability rule, Congress thus clearly contemplated that the United States would be liable in damages for actions that breach a contractual obligation -- even one that is not express at all, much less expressed in unmistakable terms.

It is logical and reasonable to apply a more stringent rule of contract interpretation in favor of the government

---

[4] The government argues (Br. 21) that *Cherokee Nation* refutes the Federal Circuit's distinction because the Tribe there was seeking to recover money from the government. But *Cherokee Nation* was not a breach of contract suit. Rather, the Tribe was seeking just compensation for an alleged taking of property. The Court ruled that the Tribe did not have the alleged property interest because it received title to the riverbed subject to the navigational servitude -- a power that stems directly from the Commerce Clause and has invariably been preserved for the federal government even against the states. *See* 480 U.S. at 704, 707. Thus, the Tribe *never* had a contract right, and the case is inapposite here where the respondents unquestionably did have a contract right and the government's argument is that the right can be destroyed by subsequent governmental action because of the unmistakability rule.

when a private party seeks to enjoin the exercise of sovereign power than when it seeks breach of contract damages for the exercise of that power. Preventing the government from taking the actions it deems necessary for governance poses far more difficult jurisprudential issues than does holding the government financially responsible for its conduct. This distinction between constraint on government action and recovery of damages is akin to that embodied in the Fifth Amendment, which "does not prohibit the taking of private property, but instead places a condition on the exercise of that power" -- namely, requiring that it pay financial compensation for the taking. *Preseault v. ICC*, 494 U.S. 1, 11, (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

The imposition of damages for breach of contract, like the need to pay just compensation, simply does not raise the kind of concern about intrusion into governmental prerogatives that lies at the heart of the unmistakability cases cited by the government. Paying damages is not a "surrender" of government power (Gov't Br. 18 (quoting *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) at 446)), and it does not "foreclos[e] exercise of sovereign authority" (Gov't Br. 16 (quoting *POSSE*, 477 U.S. at 53)).

The government's response to the distinction drawn by the Federal Circuit is tainted by the same flaw that infects its general discussion of the unmistakability principle -- namely, expanding a relatively narrow rule beyond its previously recognized bounds. Thus, the government objects (Br. 21) that if the government must pay damages for exercising regulatory authority, that could "deter" or impose some "control" on future government action. But the concern underlying the unmistakability cases was with contractual

commitments that would *foreclose* the government from future action; a contract that merely "deters" such action does not warrant any special prophylactic interpretive rule. Indeed, it is difficult to imagine any promise that a government would make in even the most ordinary contract that could not be said to act as some deterrent to future government action in derogation of that promise.

In any event, the government's argument that liability for damages is tantamount to restricting the sovereign's freedom of action is particularly tenuous in this case. Both the contracts entered into by the government here and the subsequent actions claimed to breach those contracts are primarily about money. The government made its promises concerning the treatment of goodwill in order to induce the respondents to make deals that the government believed would save it money -- by reducing the amount it would pay under the FSLIC insurance program. *See* Pet. App. 5a. The government later regretted the bargain it had struck and disallowed the approved goodwill treatment -- again because of concerns about the long-term health of the industry and the government's potential FSLIC insurance liability obligations. *See* Gov't Br. 5. The law does not afford contracting parties, including the government, the luxury of such hindsight, and it is no threat to sovereignty to hold the government to its financial bargain.

In short, the breach of contract claims here simply do not involve the kind of institutional concerns that animate the unmistakability line of cases. Rather, this case is much closer to the ones identified by this Court as inappropriate for invocation of the unmistakability rule -- namely, those where the government repudiates its obligations "simply in order to save money." *POSSE*, 477 U.S. at 55.

II. THE SOVEREIGN ACT DEFENSE DOES NOT EXCUSE THE GOVERNMENT FROM BREACH OF CONTRACT LIABILITY

A. The sovereign act defense was delineated by the Court of Claims in the earliest days of its existence. *Deming v. United States*, 1 Ct. Cl. 190 (1865); *Jones v. United States*, 1 Ct. Cl. 383 (1865). This Court has approved its general principles as "correct" (*Horowitz v. United States*, 267 U.S. 458, 461 (1925)), but the more detailed development of the doctrine has been left to the Court of Claims and its successors. As the government acknowledges (Br. 43), the doctrine is generally designed to afford the government, in its contracting capacity, a defense that would be available to a similarly situated private contractor. When a "public and general" governmental act prevents performance, a private contractor would not be liable for breach of contract damages, and the sovereign act doctrine similarly excuses the government from liability. *Horowitz v. United States*, 267 U.S. at 461; *Jones v. United States*, 1 Ct. Cl. at 384 (1925).

The sovereign act doctrine is narrowly defined in that it is not designed to confer any special immunity on the government that would not be available to a private contractor. The defense is addressed to those situations where a public and general act "incidentally impair[s]" the contract rights. *O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1982). It is inevitable that government actions will sometimes impair a party's ability to perform a contract, but those situations ordinarily do not make a private party liable for breach. "The policy underlying the sovereign act doctrine is that in those circumstances, the Government in its

contracting role, like its private counterpart, should not incur liability for its act done in the governing role." *Id.*

Thus, the sovereign act defense is merely one facet of the general principle that, when the government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875). *See also Perry v. United States*, 294 U.S. 330, 352 (1935); *Sinking Fund Cases*, 99 U.S. 700, 719 (1879). As a general rule, therefore, it is instructive to measure the availability of the defense by looking to how a private party's liability would be affected by the government action. "[A] citizen or corporate body must by supposition be substituted in [the government's place], and then the question be determined whether the action will lie against the supposed defendant." *Jones*, 1 Ct. Cl. at 385. *See also Horowitz*, 267 U.S. at 461; *O'Neill*, 231 Ct. Cl. at 826.

Here, the "substitution test" does not come into play because the "sovereign act" clearly fails the "public and general" standard. That standard ensures that the defense cannot be used to shield the government from liability when a sovereign act is targeted at the bargained-for rights of government contractors. As the Court of Claims held in *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978), the defense is not available for governmental action that is "directed principally and primarily at plaintiffs' contractual right."

This restriction on the defense does not hinge upon the government's *motivation* -- that is, it does not require that the sovereign act be an attempt to relieve the government from its bargain. On the contrary, the government action may be

motivated by public concerns that have nothing to do with the considerations that underlay the contract. If the effect is to target a set of contractual rights, however, there is no sovereign act defense.

Thus, the Court of Claims has consistently rejected the sovereign act defense in the case of government action narrowly focused on contract rights, even where the action unquestionably was motivated by "general" policy goals designed to serve the "public" at large. For example, in *Sun Oil Co. v. United States*, environmental concerns caused the government to withdraw permission for an offshore oil well. *See also Everett Plywood Corp. v. United States*, 651 F.2d 723, 729-32 (Ct. Cl. 1981) (lumber contract cancelled for environmental reasons). Similarly, in *Miller v. United States*, 140 F. Supp. 789, 790-94 (Ct. Cl. 1956), the government cancelled a contract for the sale of surplus aircraft because of national security concerns. In each of these cases, the "high reasons of public policy" (*Everett Plywood*, 651 F.2d at 728) did not insulate the government from liability for actions that were targeted at particular contract rights, and the court upheld breach of contract liability against the government in the face of a claimed sovereign act defense.

Accordingly, the government's contention here that the sovereign act doctrine applies because FIRREA was a law enacted "to advance the general welfare" (Br. 45) is not dispositive. The motivation of the legislation may have been laudable, but the Federal Circuit correctly found that "the principal effect" of the provisions addressed to supervisory goodwill was "to abrogate specific contractual rights" arising out of mergers like those engaged in by respondents. Pet. App. 40a, citing 12 U.S.C. §§ 1464(t)(3)(A) and (9)(B).

These provisions therefore are not "public and general" within the meaning of the sovereign act cases.

Indeed, in one important respect, the government's claim here is even weaker than in some of the cases where the Court of Claims previously rejected the sovereign act defense. The government action here was not motivated by some new, general welfare consideration extrinsic to the bargain, such as heightened environmental concerns. Rather, the considerations relevant to both the original bargain and the subsequent legislation were the same -- the health of the thrift industry and the attendant cost to the government's insurance fund. *See* Pet. App. 45a. The government backed out of the supervisory goodwill deal simply because it decided that it had miscalculated in entering the original deal, which is hardly an appropriate setting for escaping liability for breach of contract damages. For all these reasons, the Federal Circuit correctly rejected the government's sovereign act defense.

B. The Court of Claims also has ruled that the sovereign act defense is not available when the government action contravenes a contractual promise that is sufficiently direct to warrant the conclusion that the government assumed the financial responsibility for an intervening sovereign act. The source of this rule is *United States v. Bostwick*, 94 U.S. 53, 68-69 (1877), where the Court considered the government's liability for damage done by the military to privately-owned land. The Court ruled that the government was liable for the damage that occurred after it leased the land from the owner, but not for damage occurring before the government was a tenant. The reason for the differential treatment was that the lease carried with it an implied promise not to waste or damage the property; the government

was liable for breaching that lease covenant. In the words of the Court: "All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract." 94 U.S. at 69.

Bostwick teaches that the nature of a contractual promise may determine whether the government has assumed financial responsibility for sovereign acts that interfere with its contractual obligations. The Court of Claims has described the effect of this principle on the sovereign act defense as follows: "The doctrine of 'public and general' 'sovereign acts,' laid down in *Horowitz* . . . does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 320 F.2d 359, 366 (Ct. Cl. 1963).[5]

This doctrine is particularly applicable to contracts that expressly incorporate an existing government regulation or policy as a term of contract performance. In two recent cases involving such contracts, the Federal Circuit has rejected the government's attempt to invoke the sovereign act defense to avoid paying damages that arise from a change in the governmen. policy. In *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992), the court observed that the sovereign act doctrine "certainly does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts." *Id.* at 516 n.2. The court held that

---

[5] *See also D & L Constr. Co. v. United States* 402 F.2d 990, 999 (Ct. Cl. 1968); *Gerhard F. Meyne Co. v. United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948); *Sunswick v. United States*, 75 F. Supp. 221, 228 (Ct. Cl. 1948).

a provision in the contract requiring the contractor to adhere to specified OSHA regulations governing the slope of excavations rendered the government liable for the excess costs when OSHA changed the regulatory standard in a way that made the excavation more expensive. *Id.* at 515-16.

By the same token, in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), the government expressly promised in the contract to provide satellite launch services in accordance with "the United States policy governing launch assistance approved by the President . . . on August 6, 1982." *Id.* at 957. The court ruled that the sovereign act doctrine could not immunize the government from breach of contract damages that ensued when the President later approved a different policy that prevented NASA from providing the agreed-upon launch services. *Id.* at 958-59 & n.8.

In these cases, the incorporation in the contract of the prior policy was a direct promise by the government to perform in accordance with that policy and, correspondingly, to bear the financial risk if a sovereign act changing that policy prevented that performance. Similarly here, the incorporation in respondents' contracts of the relevant Bank Board policies and letters regarding treatment of supervisory goodwill constitutes a direct promise that prevents invocation of the sovereign act defense.

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted,

OF COUNSEL:

PROFESSOR JOHN CIBINIC, JR.
George Washington University
Law School
Washington, D.C. 20052

KATHLEEN A. BUCK
Kirkland & Ellis
Washington, D.C. 20005

MAC S. DUNAWAY
GARY E. CROSS
Dunaway & Cross
Washington, D.C. 20036

CLARENCE T. KIPPS, JR.
Counsel of Record
ALAN I. HOROWITZ
KEVIN C. DWYER
MILLER & CHEVALIER,
Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800

MARCH 1996